

Seth Shiloh Schermerhorn

August 10, 2006

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| <p style="text-align: right;">Page 6</p> <p>1 A. No.</p> <p>2 Q. Please state your current residential</p> <p>3 address.</p> <p>4 A. 2731 Southeast Fourth Street, Renton,</p> <p>5 Washington, 98056.</p> <p>6 Q. Do you have a criminal record?</p> <p>7 A. No.</p> <p>8 Q. Have you ever served in the military?</p> <p>9 A. Yes.</p> <p>10 Q. When did you serve?</p> <p>11 A. February 20th, 1989, to January 13th, 2003.</p> <p>12 Q. What were the circumstances of your</p> <p>13 discharge?</p> <p>14 A. Honorable.</p> <p>15 Q. Did you review any documents in preparation</p> <p>16 for today's deposition?</p> <p>17 A. Yes.</p> <p>18 Q. What documents did you review?</p> <p>19 A. The terms of service for the SoulCash</p> <p>20 affiliate program.</p> <p>21 Q. Anything else?</p> <p>22 A. No.</p> <p>23 Q. Did you bring any documents with you today?</p> <p>24 A. No.</p> <p>25 Q. Did you talk to anyone other than your</p> | <p style="text-align: right;">Page 8</p> <p>1 objection's withdrawn.</p> <p>2 Q. I'm going to use the abbreviation IMG for</p> <p>3 Impulse Media Group. Do you understand?</p> <p>4 A. Yes.</p> <p>5 Q. Mr. Schermerhorn, can you please describe</p> <p>6 IMG's business.</p> <p>7 A. Our primary business is we run an affiliate</p> <p>8 program that -- well, actually, we own, we operate</p> <p>9 membership-based websites which we promote through an</p> <p>10 affiliate program. And we also do mainstream</p> <p>11 projects, video projects, web projects. And that's</p> <p>12 it.</p> <p>13 Q. And you own and operate membership-based</p> <p>14 websites. What kind of websites?</p> <p>15 A. Adult websites.</p> <p>16 Q. And are these, when you say "memberships,"</p> <p>17 subscription websites?</p> <p>18 A. Subscription-based websites, yes.</p> <p>19 Q. And does IMG's affiliate program have a</p> <p>20 name?</p> <p>21 A. Yes.</p> <p>22 Q. And what is the name?</p> <p>23 A. SoulCash.</p> <p>24 Q. And how does IMG's affiliate program</p> <p>25 SoulCash work?</p> |
| <p style="text-align: right;">Page 7</p> <p>1 lawyer, Mr. Apgood, in preparation for today's</p> <p>2 deposition?</p> <p>3 A. No.</p> <p>4 Q. I'm going to define a few terms for you that</p> <p>5 I might use today. If I use the term "sexually</p> <p>6 oriented material" today, I will mean any material</p> <p>7 that depicts sexually explicit conduct unless the</p> <p>8 depiction constitutes a small and insignificant part</p> <p>9 of the whole, the remainder of which is not primarily</p> <p>10 devoted to sexual matters. Do you understand this</p> <p>11 definition?</p> <p>12 A. Yes.</p> <p>13 Q. If I use the term "sexually explicit</p> <p>14 conduct" today, I will mean actual or simulated sexual</p> <p>15 intercourse, including genital-genital, oral-genital,</p> <p>16 anal-genital, or oral-anal, whether between persons of</p> <p>17 the same or opposite sex, bestiality, masturbation,</p> <p>18 sadistic or masochistic abuse, or lascivious</p> <p>19 exhibition of the genitals or pubic area of any</p> <p>20 person. Do you understand this definition?</p> <p>21 A. Yes.</p> <p>22 MR. APGOOD: I will object to the entry of</p> <p>23 the definitions on the record to the extent that they</p> <p>24 are not used in questioning or in testimony today. If</p> <p>25 they are used in questioning or testimony today, the</p> | <p style="text-align: right;">Page 9</p> <p>1 A. Affiliates refer Internet traffic to our</p> <p>2 websites and if someone they refer signs up for</p> <p>3 access, the affiliate is paid a commission.</p> <p>4 Q. If an affiliate refers someone who</p> <p>5 subscribes to one of IMG's websites, how does IMG know</p> <p>6 to pay that affiliate for the subscription?</p> <p>7 A. They refer them through a unique URL, which</p> <p>8 tracks the sign-up as coming from them.</p> <p>9 Q. Mr. Schermerhorn, do you own IMG?</p> <p>10 A. Yes.</p> <p>11 Q. Are you the 100 percent owner of IMG?</p> <p>12 A. Yes.</p> <p>13 Q. Do you have a title within the company?</p> <p>14 A. I don't use it, but president.</p> <p>15 Q. Who is in charge of compliance issues -- and</p> <p>16 by "compliance," I mean compliance with applicable</p> <p>17 laws -- at IMG?</p> <p>18 MR. APGOOD: Objection to the form of the</p> <p>19 question.</p> <p>20 A. Please repeat the question.</p> <p>21 Q. Yes. Is there someone at IMG who is in</p> <p>22 charge of compliance issues -- and by "compliance," I</p> <p>23 mean complying with applicable laws -- at IMG?</p> <p>24 MR. APGOOD: Same objection.</p> <p>25 A. I am.</p> |

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| <p style="text-align: right;">Page 10</p> <p>1 Q. Who is responsible for creating IMG's 2 websites? 3 A. I am. 4 Q. Who decides whether a new website should be 5 added? 6 A. I do. 7 Q. And who decides whether an existing website 8 should be taken down? 9 A. I do. 10 Q. And is IMG involved in business areas other 11 than adult entertainment? 12 MR. APGOOD: Object, asked and answered. 13 A. Yes. 14 Q. What other business areas? 15 A. Web design, video production. That's it. 16 Q. Do affiliates of the SoulCash affiliate 17 program promote any websites that are not adult 18 entertainment websites? 19 A. No. 20 MR. APGOOD: Object to the extent it calls 21 for speculation. 22 Q. How long have you owned IMG? 23 A. Approximately 2001. 24 Q. Did you buy IMG from someone? 25 A. No.</p> | <p style="text-align: right;">Page 12</p> <p>1 CAN-SPAM Act? 2 A. Yes. 3 Q. How did you become aware of the CAN-SPAM 4 Act? 5 A. From like industry forums, industry 6 publications, the FTC's website for the actual legal 7 definition. 8 Q. Did IMG's employees receive any training on 9 the CAN-SPAM Act? 10 A. No. 11 Q. To your knowledge have any of IMG's 12 employees been affiliates of IMG at any point since 13 January 1st, 2004? 14 A. No. 15 Q. What is IMG's policy regarding spam? 16 A. No emailing is allowed. 17 Q. Has this been IMG's policy since January 18 1st, 2004? 19 A. It's always been our policy. 20 Q. And when you say that IMG's policy is no 21 emailing is allowed, does that mean no emailing even 22 if it's been opted into? 23 A. Yes. 24 Q. And is IMG's policy regarding email written 25 anywhere?</p> |
| <p style="text-align: right;">Page 11</p> <p>1 Q. Did you start IMG yourself? 2 A. Yes. 3 Q. How many employees does IMG currently have? 4 A. One. 5 Q. Who is that? 6 A. Josh Mackey. 7 Q. Since January 1st, 2004, has IMG had any 8 other employees besides yourself and Josh Mackey? 9 A. Yes. 10 Q. Who were they? 11 A. Pardeep Deol. 12 Q. Anyone else? 13 A. I believe Adam Welch was still around. 14 Q. Anyone else? 15 A. No, that was it. 16 Q. What is Josh Mackey's position? 17 A. Graphic designer. 18 MR. APGOOD: I'm sorry, would you read the 19 question back, please. 20 (Reporter read back as requested.) 21 Q. Of IMG's employees that have been employed 22 by IMG since January 1st, 2004, who has had direct 23 contact with affiliates? 24 A. Josh Mackey, Adam Welch. 25 Q. Mr. Schermerhorn, are you familiar with the</p> | <p style="text-align: right;">Page 13</p> <p>1 A. Yes. 2 Q. Where is it written? 3 A. I believe it's paragraph 2.3 of our terms of 4 service. 5 Q. Is it written anywhere else? 6 A. No. 7 Q. Who sets the rate structure at which IMG's 8 affiliates are paid? 9 A. I do. 10 Q. How are the payments currently structured? 11 MR. APGOOD: Object to the form of the 12 question. 13 A. Right now I'd say they either have a choice 14 of 50/50 rev share for the life of the membership that 15 they refer or one of either \$25 per sign-up they refer 16 or \$30 per sign-up they refer. 17 Q. You said \$25 or -- 18 A. \$30 per sign-up they refer. 19 Q. And the payment plans per sign-up, does an 20 affiliate go up to the \$30 level if they've brought in 21 more memberships? 22 A. I think if they send ten -- refer ten 23 memberships within a pay period, they get a \$5 24 increase. 25 Q. So, they would go from \$25 to \$30?</p> |

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| <p>1 A. Yes, and from \$30 to \$35.</p> <p>2 Q. So, is it correct to say that the affiliates</p> <p>3 are paid more the more subscriptions they bring to</p> <p>4 IMG's websites?</p> <p>5 A. Yes, it's a volume.</p> <p>6 Q. Can you explain the 50/50 rev-share program.</p> <p>7 A. If an affiliate refers somebody that pays</p> <p>8 \$5 for a subscription, they receive 50 percent of</p> <p>9 that, and then if that person decides to remain a</p> <p>10 member, and say they pay \$25 a month, they receive</p> <p>11 \$12.50, 50 percent of that. It's basically how it</p> <p>12 would work.</p> <p>13 Q. Okay. How does someone become an affiliate</p> <p>14 of IMG?</p> <p>15 A. They either click through a link and they</p> <p>16 come to our tour. If they decide they want to promote</p> <p>17 our websites, they go to a sign-up form, where they</p> <p>18 enter their info, and then they have to check a box</p> <p>19 and agree to our terms of service, and then hit</p> <p>20 "submit," and then they have to verify their email</p> <p>21 address by clicking a link that's emailed to them, and</p> <p>22 then their account is activated.</p> <p>23 Q. What information does an affiliate have to</p> <p>24 provide to IMG as a part of this sign-up process?</p> <p>25 A. First name, last name, company name, mailing</p> | <p>1 foundation laid that any such activities by IMG or</p> <p>2 affiliates is required by law or regulation or</p> <p>3 otherwise.</p> <p>4 Q. Does IMG provide support to affiliates after</p> <p>5 they become members to help them promote IMG's</p> <p>6 websites?</p> <p>7 A. Yes.</p> <p>8 Q. And what kind of support does IMG provide?</p> <p>9 A. We support them with marketing materials,</p> <p>10 like banners and free hosted video galleries that they</p> <p>11 can place on their HTML pages and promote our various</p> <p>12 websites.</p> <p>13 Q. Any other marketing materials that IMG</p> <p>14 provides?</p> <p>15 A. That's pretty much it. There's like</p> <p>16 pictures of the day, movies of the day, hosted</p> <p>17 galleries, banner advertisements.</p> <p>18 Q. Does IMG provide any other support to</p> <p>19 affiliates to help them promote IMG's websites?</p> <p>20 A. No, that's about it.</p> <p>21 Q. What is the webmaster support ticket program</p> <p>22 that IMG has?</p> <p>23 A. That's just a support ticket system, if</p> <p>24 people have questions or problems with various things</p> <p>25 or, you know, clarification, a lot of times.</p> |
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| <p>1 address, instant messenger IDs, Social Security number</p> <p>2 or tax identification number, and check a box agreeing</p> <p>3 to our terms of service.</p> <p>4 Q. Anything else?</p> <p>5 A. Not off the top of my head. That's about</p> <p>6 it.</p> <p>7 Q. Is an affiliate automatically approved if</p> <p>8 they submit this information?</p> <p>9 A. Yes.</p> <p>10 Q. Does IMG do anything to verify the mailing</p> <p>11 address submitted by affiliates?</p> <p>12 A. No. I'm sorry. To verify that they're</p> <p>13 actually living there?</p> <p>14 Q. Yes, just to verify that it's an accurate</p> <p>15 physical address.</p> <p>16 A. No, that's where their payments are sent</p> <p>17 to. They're usually accurate.</p> <p>18 Q. Are affiliates interviewed as a part of the</p> <p>19 sign-up process?</p> <p>20 A. No.</p> <p>21 Q. Are affiliates asked for references as part</p> <p>22 of the sign-up process?</p> <p>23 A. No.</p> <p>24 MR. APGOOD: I want to object to that entire</p> <p>25 line of questioning to the extent that there's no</p> | <p>1 Q. Is that system for affiliates or</p> <p>2 subscribers?</p> <p>3 A. Affiliates.</p> <p>4 Q. How does it work?</p> <p>5 MR. APGOOD: Object to the form of the</p> <p>6 question.</p> <p>7 Q. How does the support ticket program work?</p> <p>8 A. The affiliate will log in and then they'll</p> <p>9 have access to an automated form where they can make</p> <p>10 their inquiry and submit it to us, and then we can log</p> <p>11 in and see the open tickets and respond.</p> <p>12 Q. Who at IMG responds to these requests?</p> <p>13 A. I do.</p> <p>14 Q. Since January 1st, 2004, has anyone, any</p> <p>15 other IMG employee, responded to requests?</p> <p>16 A. Adam Welch might have.</p> <p>17 Q. You testified about a number of marketing</p> <p>18 materials that IMG provides to affiliates, banners,</p> <p>19 free hosted video galleries, pictures of the day, and</p> <p>20 movies of the day. Why does IMG provide these tools</p> <p>21 to affiliates?</p> <p>22 A. To give the affiliate a means to drive new</p> <p>23 -- I don't know -- prospective website members to our</p> <p>24 sites.</p> <p>25 Q. And these marketing materials, banners,</p> |

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1 free hosted video galleries, pictures of the day,
 2 movies of the day, is it feasible for affiliates to
 3 use these materials in emails to promote IMG's
 4 websites?
 5 MR. APGOOD: Objection to the extent that
 6 it calls for speculation. Object to the extent that
 7 it calls for a legal conclusion.
 8 A. Feasible? We provide it to them in a
 9 certain format. You know, if they take our graphics,
 10 it's impossible for us to control how they use them.
 11 Q. So, it's possible that they could be used
 12 in emails?
 13 A. Yes.
 14 MR. APGOOD: Objection, mischaracterizes his
 15 testimony.
 16 Q. Does IMG ask affiliates what kind of
 17 marketing they're using to promote IMG's websites?
 18 MR. APGOOD: Object to the extent that it
 19 calls for a legal conclusion or that such a duty
 20 exists.
 21 A. No.
 22 Q. Could IMG ask affiliates what kind of
 23 marketing they're using to promote IMG's websites?
 24 MR. APGOOD: Object to the extent that it
 25 calls for a legal conclusion.

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1 A. Yes, we could.
 2 Q. Has IMG ever provided lists of email
 3 addresses to affiliates?
 4 A. No.
 5 Q. Does IMG provide sales statistics to
 6 affiliates?
 7 A. Yes.
 8 Q. Can you describe that.
 9 A. It tracks raw amount of clicks sent to the
 10 site, unique amount of clicks, how many people have
 11 actually signed up, the revenue generated by those
 12 sign-ups, depending on the program they're sending to,
 13 and a ratio between clicks sent and the actual
 14 sign-ups generated.
 15 Q. In what form does IMG provide this sales
 16 statistics information to affiliates?
 17 A. Real-time web stats.
 18 Q. Why does IMG provide this sales statistic
 19 information to affiliates?
 20 A. So that affiliates can track and see their
 21 statistics.
 22 Q. Why is that?
 23 MR. APGOOD: Object to the form of the
 24 question.
 25 A. That's how they see if their marketing

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1 efforts are worthwhile.
 2 Q. Does IMG review affiliates' sales statistics
 3 on a regular basis?
 4 A. Yes.
 5 Q. Who reviews them?
 6 A. I do, if it's done.
 7 Q. What do you review them for? What are you
 8 looking for?
 9 A. Fraud and abuse.
 10 Q. How would you detect fraud or abuse by
 11 looking at sales statistics?
 12 A. Look for -- it's been a while. Just like
 13 different little suspicious indicators, like -- it's
 14 been a while since I've done it. Just like a new
 15 affiliate sending a high volume of sign-ups, we can
 16 cross-reference it with a couple of other things to
 17 see how long -- if they're sending like a high volume
 18 of sign-ups that aren't rebilling or a high volume of
 19 sign-ups that are generating chargebacks would be an
 20 example of fraud.
 21 An example of abuse would be if someone is
 22 using a method of promoting our sites that's not
 23 allowed in our terms of service, and we do that just
 24 because it's a convenient time. Usually we would do
 25 a little screening for fraud when we're doing

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1 payouts, and that's just a good time to also check
 2 for abuse.
 3 Q. Other than what you've testified to, does
 4 IMG provide any other kinds of support to affiliates?
 5 A. Any general inquiries that they have. Are
 6 you referring to the support ticket system or
 7 marketing support?
 8 Q. Either.
 9 A. No.
 10 Q. Since January 1st, 2004, have any IMG
 11 affiliates promoted IMG's websites through bulk
 12 commercial email messages?
 13 A. No.
 14 Q. And you testified previously that IMG pays
 15 affiliates for subscribers that affiliates bring to
 16 IMG's websites; is that correct?
 17 A. Yes.
 18 Q. And I know you touched on this, but can you
 19 explain to my understanding how IMG knows which
 20 affiliate to pay?
 21 A. Yes, I can. It's -- there's a unique ID
 22 that each affiliate is assigned, and that ID is in the
 23 referring URL that they place on their website, and
 24 it's tracked in the surfer's environment as their
 25 referred visitor browses our site and then if they

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| <p>1 finally decide to join, it's tracked through the join 2 process, and they are credited with the sale. 3 Q. So, is each affiliate assigned a unique user 4 ID? 5 A. Yes. 6 Q. Do some affiliates have more than one user 7 ID? 8 A. They do, but that's also a form of -- I 9 don't know, not fraud or abuse, but it's not allowed 10 in our terms of service. 11 Q. And what do the user IDs consist of? Is it 12 numbers or -- 13 A. It's a -- it's characters that they choose 14 upon when they sign up for the SoulCash program. 15 Q. Does IMG track what method of advertising 16 affiliates use to direct new members to IMG's 17 websites? 18 A. No. 19 MR. APGOOD: Object to the extent that any 20 -- that a duty exists to do so. 21 Q. Do you know a means whereby IMG could track 22 what methods of advertising an affiliate used to 23 direct members to IMG's websites? 24 MR. APGOOD: Same objection. 25 A. There's no way to accurately do that.</p> | <p>1 from a number of stores. That's the only two I can 2 remember. 3 Q. When IMG runs a bonus like that, how do they 4 let affiliates know about the bonus? 5 A. Be through like our newsletter or various 6 industry message boards. 7 Q. Does IMG send the newsletter to affiliates 8 by email? 9 A. Yes. 10 Q. How many affiliates does IMG have? 11 A. I believe between 8,000 and 9,000. 12 Q. Currently how many of these 8,000 or 9,000 13 affiliates actually promote IMG? 14 MR. APGOOD: Object to the extent that it 15 calls for speculation. 16 A. Probably between five and ten percent. 17 Q. Would it be feasible for IMG to ask these 18 active affiliates what kind of marketing they're using 19 to promote IMG? 20 MR. APGOOD: Object, calls for speculation. 21 Object to the extent that it calls for a legal 22 conclusion. Object to the extent that it implies that 23 any such duty exists. 24 A. Feasible? Yes, probably. 25 Q. Does IMG separate affiliates into tiers?</p> |
| Page 23 | Page 25 |
| <p>1 Q. Does IMG run bonus payouts? 2 A. Yes. We talked about it. 3 Q. Is that where when an affiliate brings in 4 more sales, their payout rate would go up? 5 A. Yes. 6 Q. Any other bonus payouts? 7 A. They have -- we've done different things 8 over the years, but currently, no, we haven't been 9 having any special promotions. 10 Q. Did IMG run a special promotion, a whale 11 bonus? 12 A. "Whale bonus" is just an industry term for a 13 big affiliate. There is no -- that will be the 14 increase -- the volume-based increase is called the 15 whale bonus, because it kind of would infer that the 16 affiliate is a big -- you know, they can send that 17 volume, so -- 18 Q. What other bonuses other than what we've 19 talked about has IMG run since January 1st, 2004? 20 A. We've done these Fat Fridays, like in your 21 Exhibit-6, where we paid affiliates \$50 for sign-up 22 instead of the \$25 or \$30, just to kind of acquire new 23 affiliates for the program. We've done gift card 24 giveaways; if an affiliate sent ten sign-ups or more 25 over a period, they got to choose a gift certificate</p> | <p>1 A. They can be. Not currently. 2 Q. When IMG did separate affiliates into tiers, 3 what did that mean? 4 A. It means there's different -- depending on 5 how much we wanted an affiliate to promote our sites, 6 we could give them an increased payout, kind of on a 7 case-by-case basis. I kind of lost track of it and 8 ended up sending everybody back to tier one, so we 9 don't do that anymore. 10 Q. Since January 1st, 2004, other than 11 yourself, who else at IMG has worked on the SoulCash 12 affiliate program? 13 A. Josh Mackey, Adam Welch. 14 Q. Does IMG promote its own websites outside of 15 the affiliate program? 16 A. No. 17 Q. Does IMG advertise to attract new 18 affiliates? 19 A. No, not currently. 20 Q. Since January 1st, 2004, has IMG advertised 21 to attract new affiliates? 22 A. No. 23 Q. Does IMG provide CAN-SPAM-compliant and 24 non-CAN-SPAM-compliant images to affiliates? 25 MR. APGOOD: Object to the extent that it</p> |

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| <p style="text-align: right;">Page 26</p> <p>1 calls for a legal conclusion.</p> <p>2 A. No.</p> <p>3 Q. At any point since January 1st, 2004, has</p> <p>4 IMG provided CAN-SPAM-compliant and</p> <p>5 non-CAN-SPAM-compliant images to affiliates?</p> <p>6 A. No.</p> <p>7 MR. APGOOD: Same objection.</p> <p>8 Q. What information does a new subscriber have</p> <p>9 to provide to IMG to become a member of IMG's</p> <p>10 websites?</p> <p>11 A. First name, last name, billing address, a</p> <p>12 user name and password they choose, and their credit</p> <p>13 card information.</p> <p>14 Q. And what payment methods are available to a</p> <p>15 new subscriber?</p> <p>16 A. Credit card, check, or telephone.</p> <p>17 Q. Are there any drop-down menus as a part of</p> <p>18 the initial subscription process?</p> <p>19 A. Yes.</p> <p>20 Q. What are those?</p> <p>21 A. I believe it's a drop-down menu to select</p> <p>22 the country that they're -- they live in, and I think</p> <p>23 that's it.</p> <p>24 Q. Does IMG ask new members how they got to</p> <p>25 IMG's websites?</p> | <p style="text-align: right;">Page 28</p> <p>1 I would want to track the IP address that they came</p> <p>2 from and the affiliate ID that referred them.</p> <p>3 Q. Do the initial pages of IMG's adult-oriented</p> <p>4 websites have a link to a complaint form?</p> <p>5 A. No, they don't.</p> <p>6 MR. APGOOD: I'm going to object to this</p> <p>7 entire line of questioning on the basis that it seeks</p> <p>8 information regarding subsequent remedial measures,</p> <p>9 therefore it's inadmissible.</p> <p>10 MS. HASH: It's the government's position</p> <p>11 that this line of questioning might lead to admissible</p> <p>12 evidence.</p> <p>13 Q. Has IMG considered putting a link to a</p> <p>14 complaint form?</p> <p>15 MR. APGOOD: Same objection.</p> <p>16 A. Yes.</p> <p>17 Q. And what were those considerations?</p> <p>18 MR. APGOOD: Object to the form of the</p> <p>19 question.</p> <p>20 A. Kind of along the same lines as the</p> <p>21 collecting the method of referral. It could be as</p> <p>22 simple as just a complaint email address or I think to</p> <p>23 do it right, you would want to track other info.</p> <p>24 Q. Does IMG have any methods in place to</p> <p>25 monitor affiliates for compliance with CAN-SPAM and</p> |
| <p style="text-align: right;">Page 27</p> <p>1 A. No.</p> <p>2 Q. Has IMG considered asking new members how</p> <p>3 they got to IMG's websites?</p> <p>4 A. Yes.</p> <p>5 MR. APGOOD: Object to those questions on</p> <p>6 the basis that there is no duty that exists requiring</p> <p>7 them to do so, but only to that extent.</p> <p>8 Q. What were the considerations?</p> <p>9 A. It was as a result of this whole thing.</p> <p>10 Q. When you say "this whole thing," is that the</p> <p>11 lawsuit?</p> <p>12 A. Yes.</p> <p>13 Q. What were the considerations that went into</p> <p>14 deciding not to ask new members how they got to IMG?</p> <p>15 A. I never decided not to do it. But to really</p> <p>16 make it kind of legally bulletproof, it would take</p> <p>17 quite a bit of back-end programming, and we are still</p> <p>18 planning to do it. We just have to decide how to</p> <p>19 technically integrate it into our system.</p> <p>20 Q. What are the technical considerations that</p> <p>21 go into asking such a question?</p> <p>22 A. Like I would ask multiple reasons -- or</p> <p>23 ways, methods that they got to our site by, but I</p> <p>24 think to prevent something like this from happening in</p> <p>25 the future, if it was that they were referred by spam,</p> | <p style="text-align: right;">Page 29</p> <p>1 the adult labeling rule?</p> <p>2 MR. APGOOD: Object to the extent that it</p> <p>3 calls for a legal conclusion.</p> <p>4 A. What we talked about earlier, where we do a</p> <p>5 review of the affiliates when we do our webmaster</p> <p>6 payouts.</p> <p>7 Q. Who does that review of affiliates that</p> <p>8 monitors for compliance with CAN-SPAM?</p> <p>9 A. Oh, it's done manually by myself or whoever</p> <p>10 is in charge of the payouts at the time, just by, you</p> <p>11 know, looking for a new affiliate sending a large</p> <p>12 amount of sign-ups. If something looks suspicious,</p> <p>13 we can reference it with our credit card processor</p> <p>14 for a high number of chargebacks or refunds. It's</p> <p>15 all done manually by logging into different places,</p> <p>16 just because our software doesn't support it</p> <p>17 automatically.</p> <p>18 Q. And who at IMG has done these kind of</p> <p>19 reviews?</p> <p>20 A. I have and Adam Welch.</p> <p>21 Q. And how often are these reviews done?</p> <p>22 A. Usually twice per month, but not always.</p> <p>23 Q. When is the last time such a review was</p> <p>24 performed?</p> <p>25 A. It's probably been January or February time</p> |

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| <p style="text-align: right;">Page 30</p> <p>1 frame.</p> <p>2 Q. January or February of 2006?</p> <p>3 A. Yes.</p> <p>4 Q. Have any affiliates been terminated as a</p> <p>5 result of this review, terminated for noncompliance</p> <p>6 with CAN-SPAM?</p> <p>7 A. As a result of one of these?</p> <p>8 MR. APGOOD: Object to the extent that it</p> <p>9 calls for a legal conclusion. And object to the</p> <p>10 extent that it is an attempt to investigate subsequent</p> <p>11 remedial measures that is inadmissible.</p> <p>12 A. Not as a result of these reviews.</p> <p>13 Q. Does IMG have any methods in place to</p> <p>14 prevent affiliates from sending commercial emails in</p> <p>15 violation of CAN-SPAM?</p> <p>16 MR. APGOOD: Same objections.</p> <p>17 A. Our terms of service.</p> <p>18 Q. Anything else?</p> <p>19 A. No.</p> <p>20 Q. Did IMG have affiliates before January 1st,</p> <p>21 2004?</p> <p>22 A. Yes.</p> <p>23 Q. When the CAN-SPAM law was passed, did IMG</p> <p>24 require existing affiliates to review that law?</p> <p>25 A. No.</p> | <p style="text-align: right;">Page 32</p> <p>1 exists.</p> <p>2 The client would like to break for a</p> <p>3 moment. Can we go off the record.</p> <p>4 (Discussion off the record.)</p> <p>5 Q. Has IMG ever received complaints from</p> <p>6 individuals who were the recipients of spam sent by</p> <p>7 IMG affiliates?</p> <p>8 A. Yes.</p> <p>9 Q. And what were the circumstances?</p> <p>10 A. People receiving unsolicited emails that</p> <p>11 once they clicked on the link in the email, they</p> <p>12 would be referred through another website, usually</p> <p>13 offshore somewhere, and then referred to one of our</p> <p>14 websites. So they would contact us, since our</p> <p>15 contact info is readily available on all of our</p> <p>16 websites, and depends on how upset they were, they</p> <p>17 would either yell and scream or just kind of be</p> <p>18 giving us an FYI.</p> <p>19 Q. Has IMG received complaints about</p> <p>20 affiliates sending spam since January 1st, 2004?</p> <p>21 A. Actually, we haven't. They're not</p> <p>22 complaining about the affiliates. They're just</p> <p>23 complaining that they received it, mail.</p> <p>24 Q. Does IMG have a formal policy about how to</p> <p>25 handle such a complaint?</p> |
| <p style="text-align: right;">Page 31</p> <p>1 Q. Does IMG collect referring URL information</p> <p>2 for affiliates?</p> <p>3 A. Sometimes, on the sales they do -- we do.</p> <p>4 Q. What is a referring URL?</p> <p>5 A. A referring URL is the URL that the surfer</p> <p>6 was last at before they came to our website.</p> <p>7 Q. What does IMG do with the referring URL</p> <p>8 information that it collects?</p> <p>9 A. Stores it in a database to show the</p> <p>10 affiliate where their traffic was being referred from</p> <p>11 and what traffic resulted in a sign-up.</p> <p>12 Q. How long does IMG keep referral URL</p> <p>13 information?</p> <p>14 A. I believe it's maintained -- I don't know.</p> <p>15 I'm not sure.</p> <p>16 Q. Does the referral URL information ever</p> <p>17 indicate that a subscriber came to an IMG website by</p> <p>18 way of an email sent by an affiliate?</p> <p>19 A. No.</p> <p>20 Q. Does IMG regularly review referral URL</p> <p>21 information for affiliates?</p> <p>22 A. No.</p> <p>23 MR. APGOOD: Object to the extent that the</p> <p>24 question calls for -- no, strike that. Object to the</p> <p>25 extent that the question implies that such a duty</p> | <p style="text-align: right;">Page 33</p> <p>1 A. No.</p> <p>2 Q. How are such complaints like that handled?</p> <p>3 A. I receive all that email. The first thing I</p> <p>4 do is I write back to the person that sent it and</p> <p>5 request that they forward me the complete email with</p> <p>6 the header info, and then I -- not that I have to, but</p> <p>7 I usually apologize for them receiving it and I take</p> <p>8 the email -- if -- in the few cases where they</p> <p>9 actually reply with the header info, I -- I don't know</p> <p>10 very much about tracking down that stuff, but I</p> <p>11 forward it on to my web host, who deals with it quite</p> <p>12 frequently, and he takes care of it and -- what does</p> <p>13 he do with it? He like checks SpamHouse and some of</p> <p>14 the other email reporting, spam reporting resources on</p> <p>15 the Internet, and I'm not sure specifically what he</p> <p>16 does, but maybe blocks the IPs up at the hosting</p> <p>17 level.</p> <p>18 Q. What do you mean by that?</p> <p>19 A. You can block the -- block them from being</p> <p>20 able to send to our websites anymore, because that's</p> <p>21 what -- we're just concerned with it not happening</p> <p>22 anymore, and the best way to stop it from happening is</p> <p>23 to prevent the affiliate from generating any revenue</p> <p>24 from it.</p> <p>25 Q. When you've received that email header</p> |

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| <p style="text-align: right;">Page 34</p> <p>1 information, could you tell what affiliate sent the 2 email?</p> <p>3 A. Not usually, because when they link inside 4 the email, they know that they're sending fraudulent 5 traffic that's not allowed, so they refer it through a 6 country like -- I don't know -- China or something, 7 and usually by the time that the surfer complains 8 about it and forwards us the email, the domain that 9 they were referring to has already been blocked and 10 taken down and there's just no way for us to even see 11 what their SoulCash affiliate ID was.</p> <p>12 Q. Have there been any instances where you 13 could tell what affiliate sent the email?</p> <p>14 A. Never.</p> <p>15 Q. Have any affiliates been terminated by IMG 16 as a result of a complaint?</p> <p>17 A. Not as a result of a complaint.</p> <p>18 Q. When you received these spam complaints, how 19 did you receive them?</p> <p>20 A. Via email to -- there's various emails that 21 surfers find on our websites.</p> <p>22 Q. Does IMG have a designated email address for 23 spam recipients to forward their complaints?</p> <p>24 A. No.</p> <p>25 MR. APGOOD: I object to the extent that it</p> | <p style="text-align: right;">Page 36</p> <p>1 promoting IMG's websites through spam?</p> <p>2 A. Yes.</p> <p>3 Q. What were the circumstances?</p> <p>4 A. I don't specifically remember. But somehow 5 we were able to actually track their affiliate ID, 6 like maybe their referring URL wasn't taken down or I 7 think -- I don't remember exactly, but we were able 8 to associate their complaints. Because usually they 9 come through SpamCop or SpamHouse, somebody's doing 10 fraudulent marketing via email, and my host will 11 contact me and let me know and give me whatever 12 information he has.</p> <p>13 Q. Since January 1st, 2004, how many 14 affiliates has IMG terminated for promoting IMG's 15 websites through spam?</p> <p>16 MR. APGOOD: Objection, foundation.</p> <p>17 A. I'm not positive. I think in total it's 18 like five or ten that we were actually able to track 19 down and terminate.</p> <p>20 Q. Do you recall the specifics of any of 21 those?</p> <p>22 A. I don't.</p> <p>23 Q. Was an affiliate Zillium terminated for 24 sending spam?</p> <p>25 A. Yes.</p> |
| <p style="text-align: right;">Page 35</p> <p>1 implies that such a duty exists.</p> <p>2 Q. You testified about the ISP being blocked 3 when you received the -- sorry. Can you restate what 4 you said about the ISP being blocked when you received 5 a complaint.</p> <p>6 MR. APGOOD: Objection to the extent that it 7 mischaracterizes testimony substantially.</p> <p>8 A. It was at the -- it wasn't the ISP, but at 9 the actual data center level, and I was just saying 10 I'm not sure what he does, but I know that he's also 11 concerned about any fraudulent emails, so he has his 12 fraud controls that he does. One of them, I think I 13 said that you could like see the IP that the traffic 14 was being referred from and block it before it even 15 makes it to our servers in the data center.</p> <p>16 Q. Do you know of any specific action that was 17 taken at the data center level as a result of a spam 18 complaint you forwarded on?</p> <p>19 A. No.</p> <p>20 Q. Have you received spam complaints via other 21 means than email?</p> <p>22 A. I think once or twice people may have even 23 called our office via phone numbers that are 24 published.</p> <p>25 Q. Has IMG ever terminated an affiliate for</p> | <p style="text-align: right;">Page 37</p> <p>1 Q. What were the circumstances surrounding 2 that termination?</p> <p>3 A. We saw his name pop up in this whole 4 lawsuit, and we were actually trying to figure out 5 and remember what the circumstances were. I kind of 6 like focus more on preventing it than the actual, you 7 know, reason it happened. Zillium. I honestly -- I 8 don't remember.</p> <p>9 Q. Do you know when Zillium was terminated?</p> <p>10 A. Long enough for me not to remember. 11 Probably -- I don't remember exactly.</p> <p>12 Q. Do you know who terminated Zillium?</p> <p>13 A. I did.</p> <p>14 Q. At any point was Zillium reinstated as an 15 affiliate of IMG?</p> <p>16 A. Never.</p> <p>17 Q. If the affiliate Zillium provided new 18 information to IMG, is it possible that Zillium became 19 an affiliate of IMG later?</p> <p>20 MR. APGOOD: Objection, calls for 21 speculation.</p> <p>22 A. It's possible.</p> <p>23 Q. Was an affiliate Scorpion terminated?</p> <p>24 A. Yes.</p> <p>25 Q. Why?</p> |

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| <p style="text-align: right;">Page 42</p> <p>1 Q. And what do you base that belief on?</p> <p>2 A. Just a recollection of what happened when</p> <p>3 they got terminated.</p> <p>4 Q. What do you recall?</p> <p>5 A. That they were mailers. That's just from</p> <p>6 this whole lawsuit, looking at -- glancing at the</p> <p>7 accounts that were terminated in our database and</p> <p>8 trying to remember the circumstances.</p> <p>9 Q. Is there anything in that database that</p> <p>10 references Dacash being terminated for mailing?</p> <p>11 A. No, not -- no. That was just my</p> <p>12 recollection of what happened at the time.</p> <p>13 Q. Do you know anything surrounding the</p> <p>14 termination of the affiliate Scumbag?</p> <p>15 A. Yeah, I think he was spamming -- he wasn't</p> <p>16 mailing. He was spamming like AOL groups or something</p> <p>17 like that.</p> <p>18 Q. Do you know when Scumbag was terminated?</p> <p>19 A. That also would have been more than 12</p> <p>20 months ago. I don't recall exactly.</p> <p>21 Q. And has Scumbag been reinstated?</p> <p>22 A. No.</p> <p>23 Q. Do you know anything surrounding the</p> <p>24 termination of the affiliate Olegwn, O-l-e-g-w-n?</p> <p>25 A. No. He was mailing, also. I don't</p> | <p style="text-align: right;">Page 44</p> <p>1 termination of the affiliate Megaporn?</p> <p>2 A. No.</p> <p>3 Q. And do you know anything surrounding the</p> <p>4 termination of the affiliate Cahek, C-a-h-e-k?</p> <p>5 A. No.</p> <p>6 Q. The terminated affiliates I've just asked</p> <p>7 you about, was there a record of the reasons for the</p> <p>8 termination of these affiliates made anywhere?</p> <p>9 A. No, nowhere.</p> <p>10 Q. To your knowledge was the date of</p> <p>11 termination for any of these affiliates recorded</p> <p>12 anywhere?</p> <p>13 A. It may be in the database, but I'm not</p> <p>14 sure.</p> <p>15 Q. And to your knowledge were any of these</p> <p>16 affiliates reinstated?</p> <p>17 A. No.</p> <p>18 Q. And if any of these affiliates submitted</p> <p>19 completely new information as part of the affiliate</p> <p>20 sign-up process, is it possible that they became an</p> <p>21 affiliate of IMG after being terminated?</p> <p>22 MR. APGOOD: Objection, calls for</p> <p>23 speculation.</p> <p>24 A. Yes.</p> <p>25 Q. Can you describe IMG's database of affiliate</p> |
| <p style="text-align: right;">Page 43</p> <p>1 remember the exact circumstances of him being</p> <p>2 canceled. He might be one of the ones that was</p> <p>3 mailing, like directly to our URLs. That's how we</p> <p>4 found him.</p> <p>5 MR. APGOOD: I'm going to instruct the</p> <p>6 witness to testify only as to what knowledge he has,</p> <p>7 not to guess. You can certainly estimate. That's</p> <p>8 certainly permitted. But if you don't recall the</p> <p>9 information, please don't guess at the answer.</p> <p>10 THE WITNESS: Okay.</p> <p>11 Q. Do you have any knowledge regarding the</p> <p>12 termination of the affiliate Euro2004?</p> <p>13 A. No.</p> <p>14 Q. Do you know anything surrounding the</p> <p>15 termination of the affiliate Spider?</p> <p>16 A. No.</p> <p>17 Q. Do you know anything surrounding the</p> <p>18 termination of the affiliate Montana?</p> <p>19 A. I believe he was terminated for mail. I</p> <p>20 don't remember the exact circumstance or how he was --</p> <p>21 how it was determined he was sending mail.</p> <p>22 Q. Do you know when Montana was terminated?</p> <p>23 A. That would have also been more than 12</p> <p>24 months ago.</p> <p>25 Q. Do you know anything surrounding the</p> | <p style="text-align: right;">Page 45</p> <p>1 information.</p> <p>2 MR. APGOOD: Object to the form of the</p> <p>3 question.</p> <p>4 A. Yes. The affiliate database?</p> <p>5 Q. Does IMG maintain a database of affiliate</p> <p>6 information?</p> <p>7 A. Yes.</p> <p>8 Q. How do you refer to this database?</p> <p>9 A. Affiliate database.</p> <p>10 Q. Okay. Can you describe the affiliate</p> <p>11 database.</p> <p>12 A. Yes. It contains all the info that I</p> <p>13 previously described as being part of the sign-up</p> <p>14 process or the information that they input on the</p> <p>15 sign-up page, plus it does record the date that they</p> <p>16 initially signed up and also their status between</p> <p>17 nonconfirmed, which means that they haven't yet</p> <p>18 clicked on the email that -- their email to confirm</p> <p>19 that their email is a valid email, active for someone</p> <p>20 that's active in the affiliate program. And then</p> <p>21 there's a T for terminated, which is someone that's</p> <p>22 been terminated for some reason.</p> <p>23 Q. Does the affiliate database contain</p> <p>24 information regarding how much affiliates have been</p> <p>25 paid?</p> |

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| <p style="text-align: right;">Page 50</p> <p>1 exhibit -- I'm talking about specifically page 1 -- 2 excuse me, page 2 of Exhibit-1, I believe this is 3 numbered; is that correct? 4 MS. HASH: Yes. Why don't we continue the 5 deposition and come back to this at the end, if that's 6 acceptable. 7 MR. APGOOD: I'm sorry? 8 MS. HASH: Continue the deposition, the rest 9 of the questions, and then we can come back to this 10 issue again, whether to reconvene tomorrow. 11 MR. APGOOD: Okay, that's fine. 12 MS. HASH: Is it possible that you could 13 produce a complete version of this spreadsheet today? 14 MR. APGOOD: If I have it, yes, it is 15 possible. I will have to go back and check to see 16 what I have in my records. One other alternative 17 would be for you to pose your questions on this 18 exhibit on the record and we can then answer those 19 questions after we close this deposition and provide 20 written responses to those questions. 21 MS. HASH: Okay. Would it be acceptable 22 once the government has the opportunity to review the 23 spreadsheet to pose written questions and you provide 24 answers to those questions? 25 MR. APGOOD: Yes, absolutely.</p> | <p style="text-align: right;">Page 52</p> <p>1 banned. 2 A. "You will not use any form of mass 3 unsolicited electronic mail solicitations, news group 4 postings, IRC posting or any other form of 'spamming' 5 as a means of promoting Your Website or for the 6 purpose of directing or referring users to any 7 SoulCash websites." 8 Q. Does paragraph 2.3 of government Exhibit-4 9 ban the use of solicited email by affiliates? 10 A. No, it doesn't. 11 Q. Does IMG have a ban on solicited email by 12 affiliates written anywhere else? 13 A. I don't -- 14 MR. APGOOD: Object to the form of the 15 question. 16 A. One second. 17 Q. Take your time. 18 MR. APGOOD: Also, object to the question to 19 the extent that it mischaracterizes prior testimony of 20 the witness. 21 A. Paragraph 3.6 says that they're not 22 authorized to use any of our intellectual property 23 which is banners, videos, in -- or in any other way, 24 except what's expressly authorized by us. 25 Q. Did you say paragraph 3.6?</p> |
| <p style="text-align: right;">Page 51</p> <p>1 MS. HASH: Still it's the government's 2 position that the deposition will remain open until 3 that time where the government will pose written 4 questions and the defendant will answer those 5 questions. 6 EXAMINATION (Resumed) 7 BY MS. HASH: 8 Q. Mr. Schermerhorn, what does the term "spam" 9 mean to you? 10 A. Unsolicited email. 11 Q. Handing you what's been previously marked 12 government Exhibit-4, do you recognize this document? 13 A. Yes. 14 Q. What is it? 15 A. SoulCash program agreement, terms of 16 service. 17 Q. And you testified previously that the IMG 18 ban on the use of email by affiliates is in the 19 SoulCash terms and conditions; is that this document? 20 A. Yes. 21 Q. Can you point to where in these terms and 22 conditions the use of email by affiliates is banned? 23 A. Paragraph 2.3. 24 Q. And can you read specifically where in 25 paragraph 2.3 the use of all email by affiliates is</p> | <p style="text-align: right;">Page 53</p> <p>1 A. 3.6. The top of each of our banner pages 2 tells them how to use the media that's on that page. 3 Q. Is there anywhere written an express ban on 4 affiliates using solicited email to promote IMG's 5 website? 6 MR. APGOOD: Objection, asked and answered. 7 He just gave testimony to the question. 8 Q. Is it your position that paragraph 3.6 is an 9 express -- 10 A. It doesn't mention solicited emails 11 anywhere. 12 Q. Handing you what's been previously marked 13 government Exhibit-6 -- 14 MS. HASH: Counsel, do you have a copy from 15 yesterday? 16 MR. APGOOD: Exhibit-6? 17 MS. HASH: Yes. 18 Q. Mr. Schermerhorn, do you recognize this 19 document? 20 A. Yes. 21 Q. Directing your attention to the first three 22 physical pages of government Exhibit-6, what is this? 23 A. It's a newsletter, affiliate newsletter, 24 letting them know that there's some new links to 25 hosted galleries for them to use to promote our</p> |

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1 websites.
 2 Q. How would an affiliate use these links?
 3 MR. APGOOD: Objection, calls for
 4 speculation.
 5 A. They would take these links and put them on
 6 their -- the HTML pages of their websites and send
 7 them -- send their visitors to their websites, to
 8 these URLs, which would display them sales material.
 9 Q. And when an affiliate uses these links, do
 10 they contain the affiliate's user ID?
 11 MR. APGOOD: Objection, calls for
 12 speculation.
 13 A. Yes.
 14 Q. Could an affiliate use these links in an
 15 email to promote IMG's websites?
 16 MR. APGOOD: Objection, calls for
 17 speculation. Objection, calls for legal conclusion.
 18 A. Yes.
 19 Q. Handing you what's been previously marked
 20 government Exhibit-15, do you recognize this document?
 21 A. Yes.
 22 Q. And what is it?
 23 A. It's a screen shot of the POTD page from
 24 SoulCash.com.
 25 Q. What is the POTD page?

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1 A. It's the links to our POTDs that affiliates
 2 see.
 3 Q. And are these links for affiliates to use to
 4 promote IMG's website?
 5 A. Yes.
 6 Q. If an affiliate used one of these links,
 7 would it contain their ID?
 8 A. Yes.
 9 Q. Could an affiliate use one of these links in
 10 an email to promote IMG's website?
 11 MR. APGOOD: Objection, calls for legal
 12 conclusion. Objection, calls for speculation.
 13 A. Yes.
 14 Q. Handing you what's been previously marked
 15 government Exhibit-21, is this XXXSalsa.com website
 16 owned by IMG?
 17 A. Yes.
 18 Q. Do you recognize the image in this exhibit?
 19 A. Yes.
 20 Q. Is this image the property of IMG?
 21 A. We have one, yes, just like it.
 22 Q. Looking at the body of this email,
 23 government Exhibit-21, if you were the recipient of
 24 this email and you wanted to opt out from receiving
 25 further email messages from the sender, what would you

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1 do?
 2 MR. APGOOD: Objection, calls for
 3 speculation. Objection, I object to the use of this
 4 exhibit in that it is incomplete because it does not
 5 have accompanying it the source code of the email
 6 message, which -- the government very well knows the
 7 distinction between the source code and email message
 8 and the graphic representation of the message as it
 9 has previously submitted sworn testimony to that
 10 effect in other cases that are CAN-SPAM-related
 11 cases. Therefore, this exhibit is completely
 12 incomplete and to ask the witness to conjecture or to
 13 form any opinion based upon that is improper and this
 14 violates the rules of evidence.
 15 Q. Based on the exhibit that's before you, if
 16 you were the recipient of this email and you wanted to
 17 opt out from receiving further email messages from the
 18 sender, what would you do?
 19 MR. APGOOD: Objection, calls for
 20 speculation.
 21 A. To answer that, I'd have to guess that
 22 that's -- I won't guess. It says "Click here to be
 23 removed" at the bottom. I guess I would try and click
 24 there, depending on what that text actually is in the
 25 email.

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1 Q. Is the text "Click here to be removed" below
 2 the image in government Exhibit-21?
 3 A. Could you say that again, please.
 4 Q. Yes. Is the text "Click here to be removed"
 5 located below the image in government Exhibit-21?
 6 A. Yes.
 7 Q. In your opinion, based on the exhibit in
 8 front of you, does this email comply with what you
 9 understand the CAN-SPAM Act and adult labeling rule to
 10 require?
 11 MR. APGOOD: Objection, calls for legal
 12 conclusion. Objection, calls for the witness to give
 13 expert testimony. This witness has not been qualified
 14 as an expert.
 15 Q. Are you familiar with the CAN-SPAM Act?
 16 A. Yes.
 17 Q. Based on your understanding of the CAN-SPAM
 18 Act, does this email comply with what you understand
 19 the act to require?
 20 MR. APGOOD: Same objections.
 21 A. No.
 22 Q. Handing you what's been previously marked
 23 government Exhibit-22, is Funtit.com a website owned
 24 by IMG?
 25 A. Yes.

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| <p style="text-align: right;">Page 62</p> <p>1 address." I'd probably try and click that red text 2 that's below the image that says "Click Here." 3 Q. In the text it says, "Click Here to remove 4 your email address." Is it located below the image in 5 this email? 6 A. Yes. 7 Q. In your opinion does this email comply with 8 what you understand the CAN-SPAM Act and adult 9 labeling rule to require? 10 A. No. 11 Q. Handing you what's been previously marked 12 government Exhibit-29, is MelodyHart.com a website 13 owned by IMG? 14 A. Yes. 15 Q. And do you recognize the content in this 16 exhibit? 17 A. I recognize the image. 18 Q. Is this email promoting an IMG website? 19 A. I can't really tell without seeing the 20 source code of the email, but most likely it is. 21 Q. Looking at government Exhibit-29, if you 22 were the recipient of this email and you wanted to opt 23 out from receiving further email messages from the 24 sender, what would you do? 25 MR. APGOOD: Objection, calls for</p> | <p style="text-align: right;">Page 64</p> <p>1 regular basis to look for fraud and abuse. Do you 2 recall that testimony? 3 A. Yes. 4 Q. You also gave some explanations and examples 5 of that; is that correct? 6 A. Yes. 7 Q. How does review of the stats show how the 8 terms of service are being violated? Let me be more 9 specific. 10 A. I got the question. 11 Q. Okay. 12 A. I mean in reviewing like the referring 13 information where it's actually good referring 14 information and you could see a website, you could 15 see, like, you know, violations of marketing -- the 16 usage of our marketing material. 17 Q. Can you give me an example of how those 18 usage rates would indicate that the terms of service 19 are being violated. 20 A. It would have to be something else that 21 popped -- that made us -- drew attention to it, and 22 then if we started researching affiliates referring 23 traffic and their referring web pages, we could see 24 like any misuse of -- like misleading the referred 25 traffic by making false promises, which would fall</p> |
| <p style="text-align: right;">Page 63</p> <p>1 speculation. 2 A. There are no instructions for opting out 3 that I can see. 4 Q. In your opinion does this email comply with 5 what you understand the CAN-SPAM Act and adult 6 labeling rule to require? 7 A. No. 8 Q. What does IMG do to recruit new affiliates? 9 A. Nothing currently. 10 Q. Who at IMG has terminated an affiliate since 11 January 1st, 2004? 12 A. It would be me, if there were any terminated 13 since then. 14 Q. And does IMG monitor new affiliate sign-ups 15 to make sure a terminated affiliate does not sign up 16 to the program again? 17 A. No. 18 MR. APGOOD: Objection to the extent that 19 the question implies that such a duty exists. 20 MS. HASH: I don't have any further 21 questions at this time. 22 E X A M I N A T I O N 23 BY MR. APGOOD: 24 Q. Previously you provided testimony that IMG 25 reviews the stats on a regular basis or somewhat</p> | <p style="text-align: right;">Page 65</p> <p>1 under the part of the terms of service that talks 2 about the marketing material that they're authorized 3 to use or not use. 4 Q. Are these conclusions, then, inferences you 5 draw based upon a number of different sources of 6 information? 7 A. Yes. 8 Q. Is there anything in the statistics 9 reporting that shows definitively that terms of 10 service are being violated? 11 A. No. 12 Q. Previously you gave testimony that it's 13 possible for an affiliate who had been terminated to 14 resubscribe as a new affiliate; is that an accurate 15 assessment of your testimony? 16 A. Yes. 17 Q. In doing so would they have to be providing 18 totally different information than they previously 19 provided to the account that was terminated? 20 A. Yes, to an extent. 21 Q. Would you consider that a fraudulent attempt 22 to become an affiliate? 23 A. Yes. 24 Q. Previously you gave testimony that the 25 affiliate database is searchable, but it's not</p> |

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| <p style="text-align: right;">Page 66</p> <p>1 searchable by design or words to that effect; is that</p> <p>2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. Is there any information screen that allows</p> <p>5 you to input search terms that will then provide</p> <p>6 responsive information?</p> <p>7 A. Yeah, I mean, there is limited search</p> <p>8 capabilities, like I was able to search for</p> <p>9 terminated and active, but it's all via a -- I think</p> <p>10 I can search by affiliate ID and I can -- there's a</p> <p>11 pull-down menu that lets me select all the terminated</p> <p>12 accounts or active accounts or nonconfirmed accounts.</p> <p>13 Q. What other search criteria is available to</p> <p>14 you through that interface?</p> <p>15 A. Actually, I think the affiliate ID, first</p> <p>16 and last name, company name, and then their account</p> <p>17 status.</p> <p>18 Q. Anything else?</p> <p>19 A. Not off the top of my head.</p> <p>20 Q. Okay. I'm going to redirect your attention</p> <p>21 back to Exhibit-No.-4. As I recall, you provided</p> <p>22 testimony that this is the SoulCash program agreement</p> <p>23 or terms of service; is that correct?</p> <p>24 A. Yes.</p> <p>25 Q. Aside from what's stated in this agreement</p> | <p style="text-align: right;">Page 68</p> <p>1 A. Yes.</p> <p>2 Q. Who is the email ostensibly from?</p> <p>3 A. "Wandie krysta, rationalizing@</p> <p>4 heartsurgeons.com."</p> <p>5 Q. Is HeartSurgeons.com a domain that's under</p> <p>6 the possession, control or otherwise owned by Impulse</p> <p>7 Media Group?</p> <p>8 A. No.</p> <p>9 Q. Have you ever sent emails from anyone or any</p> <p>10 email address purporting to be within the</p> <p>11 HeartSurgeons.com domain?</p> <p>12 A. No.</p> <p>13 Q. Did anyone at Impulse Media Group with your</p> <p>14 knowledge, consent, or assent send this particular</p> <p>15 email to anyone?</p> <p>16 A. No.</p> <p>17 Q. If you look at the "To" line, sir, who is</p> <p>18 the "To" message?</p> <p>19 A. "Yvonne1908@hotmail.com."</p> <p>20 Q. Have you ever encountered the email address</p> <p>21 Yvonne1908@hotmail.com?</p> <p>22 A. No.</p> <p>23 Q. Do you have any knowledge one way or the</p> <p>24 other as to whether or not Yvonne1908@hotmail.com</p> <p>25 actually belongs to a real person who could be injured</p> |
| <p style="text-align: right;">Page 67</p> <p>1 at this time, as a matter of practice, does Impulse</p> <p>2 Media Group now or has it at any time in the past</p> <p>3 allowed affiliates to use email promotions to promote</p> <p>4 IMG websites?</p> <p>5 A. No.</p> <p>6 Q. I'm going to direct your attention again to</p> <p>7 paragraph 3.6 of the agreement. Does anything in</p> <p>8 paragraph 3.6 allow affiliates to use email promotions</p> <p>9 to promote Impulse Media Group websites?</p> <p>10 A. No.</p> <p>11 Q. Is it your understanding that paragraph 3.6</p> <p>12 specifically precludes anything so far as promotion</p> <p>13 that is not otherwise specifically allowed within this</p> <p>14 agreement?</p> <p>15 A. Yes.</p> <p>16 Q. Would that include email promotions, whether</p> <p>17 solicited or unsolicited?</p> <p>18 A. Yes.</p> <p>19 Q. Can you turn your attention again, sir, to</p> <p>20 Exhibit-21. I believe you testified that Exhibit-21</p> <p>21 is an email message or appears to be so; is that</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. Do you see the "From" line at the top of the</p> <p>25 page of Exhibit-21?</p> | <p style="text-align: right;">Page 69</p> <p>1 by the receipt of this email message?</p> <p>2 A. No.</p> <p>3 Q. Are you familiar with Microsoft's Hotmail</p> <p>4 spam-trap accounts?</p> <p>5 A. No.</p> <p>6 Q. Thank you. Now turn your attention again,</p> <p>7 sir, to Exhibit-22.</p> <p>8 A. I got it.</p> <p>9 Q. You previously testified this appears to be</p> <p>10 an email message; is that correct?</p> <p>11 A. Yes.</p> <p>12 Q. Do you see the "From" line, sir?</p> <p>13 A. Yes.</p> <p>14 Q. Who is the "From" in that line?</p> <p>15 A. "Kerianneedna elsie," email is</p> <p>16 "Delft@jdmail.com."</p> <p>17 Q. Is jdmail.com a domain that's within the</p> <p>18 possession, control, or otherwise owned by Impulse</p> <p>19 Media Group?</p> <p>20 A. No.</p> <p>21 Q. Have you ever before encountered the email</p> <p>22 address Delft@jdmail.com?</p> <p>23 A. No.</p> <p>24 Q. Do you see the "To" line, sir?</p> <p>25 A. Yes.</p> |

Seth Shiloh Schermerhorn

August 10, 2006

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| <p style="text-align: right;">Page 78</p> <p>1 it be reopened for cross-examination. 2 MS. HASH: I don't think it's new 3 information, but that's fine if you want to recross. 4 A. Besides what's covered in our terms of 5 service, the -- ask the question one more time, 6 please. 7 Q. What affirmative steps does IMG take to 8 prevent affiliates from using email to promote IMG's 9 websites? 10 MR. APGOOD: Objection that the question 11 implies that there's a duty to do so. 12 A. Our terms of service. 13 Q. Anything else? 14 A. No. 15 Q. And directing your attention to government 16 Exhibit-29, is the double-line box located below the 17 image in this exhibit? 18 A. Yes. 19 FURTHER EXAMINATION 20 BY MR. APGOOD: 21 Q. Turning your attention back to Exhibit-29, 22 if Herbert65@hotmail.com had opted into an email list, 23 does this change your opinion as to whether or not 24 government's Exhibit-29 is compliant with CAN-SPAM and 25 adult labeling rule?</p> | <p style="text-align: right;">Page 80</p> <p>1 government's counsel. 2 MS. HASH: That's fine. Off the record. 3 (Discussion off the record.) 4 A. I would just like to clarify. There was a 5 question about -- it was a question from you that led 6 to me mentioning my host, Swift Communications, and 7 what they -- what I think he does to track down people 8 that have generated spam complaints on his network, 9 and I just wanted to clarify that I really have no 10 idea. I was just totally speculating about what he 11 does. He does do something, but as to what exactly 12 his procedures are there, I'm not -- I really have no 13 idea what he does. 14 Q. Do you have any specific knowledge regarding 15 his procedures? 16 A. Not specific. I know that they're there and 17 I know that he contacts them if there's ever -- the 18 very few times that there's been a problem. 19 Q. And has he contacted you since January 1st, 20 2004, about a problem? 21 A. No. 22 MS. HASH: Okay. 23 FURTHER EXAMINATION 24 BY MR. APGOOD: 25 Q. Just for clarification, then, Mr.</p> |
| <p style="text-align: right;">Page 79</p> <p>1 A. Yes. 2 MR. APGOOD: Thank you. No more questions. 3 MS. HASH: For the record, the government's 4 position is that this deposition is not closed. The 5 government requested a complete version of the 6 spreadsheet on terminated affiliates in Exhibit-1, and 7 has not received it. The government still has 8 relevant questions regarding this outstanding 9 discovery and the deposition is not closed until we 10 receive that discovery and have an opportunity to 11 question the witness about it. 12 MR. APGOOD: We'll stipulate to that to the 13 extent that it's a reasonable number of questions and 14 the government doesn't use it as an opportunity to 15 unnecessarily prolong discovery or open up new avenues 16 of questioning totally unrelated to government's 17 Exhibit-No.-1. 18 MS. HASH: Thank you. 19 FURTHER EXAMINATION 20 BY MS. HASH: 21 Q. Upon reflection, can you think of any answer 22 that you gave today that you wish to clarify? 23 THE WITNESS: Can I talk to you for a 24 second? 25 MR. APGOOD: If there's no objection by the</p> | <p style="text-align: right;">Page 81</p> <p>1 Schermerhorn, the testimony you gave regarding what 2 Swift Communications does regarding the subject 3 matter, was that entirely speculation on your part 4 during your testimony? 5 A. Yes, it is speculation. 6 MR. APGOOD: Nothing else. 7 MS. HASH: Thank you. 8 (Deposition adjourned at 1:25 p.m.) 9 (Signature reserved.) 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> |